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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1609

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioner,

vs.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Chamber of Commerce of the United States of America, Intervenor[2] below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case.

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1. The National Labor Relations Board and the Dow Chemical Company were also parties in the proceeding before the Court of Appeals; pursuant to Supreme Court Rule 21(4) they are respondents with respect to this petition, although their interests are not adverse to the Chamber's.

2. The Chamber of Commerce was a charging party in the proceeding before the National Labor Relations Board, and based thereon was an Intervenor in the Court of Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 524 F. 2d 853, ... U. S. App. D. C. ..... (D. P. 1a)[3]; its order denying rehearing by a vote of 5-4 (D. P. 24a) has not yet been reported. The opinion of the National Labor Relations Board is reported at 211 NLRB No. 59, 86 LRRM 1381 (D. P. 26a).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 15, 1975. Rehearing was denied on February 4, 1976.

Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U. S. C. § 1254 and Section 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(e).

QUESTION PRESENTED.

Whether the protection of the secondary boycott statute (29 U. S. C. § 158(4)(B)) extends to rehearing of a neutral employer to embroil him in a consumer boycott which has the foreseeable consequence of inducing customers to withhold all patronage or otherwise to disrupt the neutral's fundamental business operations in order to affect his relationship with the primary employer.

STATUTE INVOLVED.

The relevant provisions of Section 8(b)(4)(B) (29 U. S. C. § 158(4)(B)) of the National Labor Relations Act, as amended[4] are set forth below:

3. Because the opinion of Court of Appeals below, the order denying rehearing and the opinion of the NLRB are reproduced as an appendix to the Petition for Writ of Certiorari filed by the Dow Chemical Company those items are not reproduced here. The references "D.P." are to the page of the appendix to Dow's Petition.

4. 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.*

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *:

* * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed *to prohibit publicity other than picketing,* for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution; * * *" (emphasis supplied)

STATEMENT OF THE CASE.

Commencing in February, 1972, the Respondent, Local 14055, United Steelworkers of America, AFL-CIO (hereinafter the "Union"), became engaged in a primary labor dispute with Bay Refining Division, Dow Chemical Company (hereinafter "Bay Refining"). In support of its dispute with Bay Refining, the Union picketed six independent retail gasoline stations that sold gasoline under the "Bay" logo and that prominently displayed signs indicating they were distributors of "Bay" fuel. The picket signs variously read, "Don't Buy Bay", "Dow Chemi-

cal Unfair to Union Labor", "Don't Buy Bay Gas" (A259, 272, 113-115, 19-20, 74).[5]

These six retail gasoline stations were owned and operated independently of Bay Refining and they conducted their own independent labor relations policies. The predominant product sold by these stations was Bay gasoline. Sales of this product accounted for between 80% and 98% of the gross revenues of five of the six stations with the remainder of the sales representing miscellaneous items and services generally incidental to the gasoline sales (A17, 23-25, 30-33, 73). For the sixth station, Alexander's, somewhat less than 50% of its revenue was from the sale of Bay gasoline.[6] The sale of gasoline was critical to the successful operation of all the stations including Alexander's since customers ordinarily purchased the other products and services as merely an incident to patronizing the stations for the purpose of buying gas (A66-68, 84).

A majority of the National Labor Relations Board, sitting *en banc*, found that the Union's conduct constituted "restraint and coercion" of the neutral gasoline stations to force or require them to cease handling the products of the primary employer, Bay Refining in violation of Section 8(b)(4)(B) of the Act. In considering the doctrine, announced by this Court in *Tree Fruits*,[7] that picketing of a product which constitutes an insubstantial part of a retailers business is not within the intendment of Section 8(b)(4)(B), the Board held that the circumstances of this case invoke different legal considerations Noting that *Tree Fruits* did not address itself to the boycott of a product which constituted the neutral retailers principal stock-in-trade, the Board was of the opinion that "we are at the very least required to make our own independent judgment . . ." on that issue (D. P. 35a). The Board used as its point of departure the distinction drawn in *Tree Fruits* between "peaceful consumer picketing to shut off all trade of the secondary employer" which constituted a clear violation of the Act, and picketing which only persuades customers not to buy one of many products marketed by the retailer which was held not unlawful. Applying a standard of economic realism, the Board determined that "the nature of the business and of the picketing" rendered the Union's picketing the equivalent of an appeal to customers "not [to] trade at all with the neutral party" (D. P. 35a). Relying upon the congressional intent to insulate neutral employers, such as the gasoline stations here, from the economic harm which stems from entanglement in labor disputes not their own, the Board found such conduct to be violative Section 8(b)(4)(B) of the Act.

On petitions for review and enforcement pursuant to 29 U. S. C. § 160(e) and (f), the court of appeals reversed the Board. In that court's view, the *Tree Fruits* doctrine protected all picketing which followed an identifiable struck product regardless of the economic impact upon the business of the neutral employer.

REASONS FOR GRANTING THE WRIT.

A. The Question Left Unresolved by Tree Fruits Has Created a Division of Opinion Among the Circuits.

As the Board's decision recognizes, the facts here give rise to the hard case not reached by this Court's opinion in *Tree Fruits*. In that case, the Court held lawful such picketing as was specifically addressed to consumers and which as a practical matter had the limited effect of inducing a boycott of a single

5. "A" refers to the record by page numbers of the Appendix filed by the Union in the proceeding below before the Court of Appeals for the District of Columbia.

6. Alexander's was the only one of the six service stations that sold other brands of gasoline. Its total revenues from the sale of gasoline, of all brands was between 60% and 65%. Alexander's unlike the other stations, was also a tire dealer which accounted for its higher percentage of revenues attributable to items other than fuel (A274).

7. *N. L. R. B.* v. *Fruit and Vegetable Packers Warehousemen, Local 760 (Tree Fruits Labor Relations Committee, Inc.)*, 377 U. S. 58 (1964).

product which was an insubstantial part of the neutral retailer's overall business. The Court's analysis did not specifically deal with the extent to which the surrounding circumstances (such as the impact of the picketing and the nature of the neutral's business) should be considered in determining whether a product boycott entails a secondary object proscribed by the Act. See *National Woodwork Manufacturers Ass'n* v. *N. L. R. B.*, 386 U. S. 612 (1967). However, it did clearly state that picketing which induced consumers to withhold *all* patronage would be proscribed. The instant case presents a factual situation in which although the Union's picketing in form is directed toward a single product, in substance its foreseeable effect is to call for a total cessation of patronage of the neutral. In *Tree Fruits*, the Court did not resolve the question of whether such conduct is proscribed.

The court of appeals below resolved this unanswered issue in a manner that was not only inconsistent with the *en banc* decision of the administrative agency charged with interpreting the Act, but with other appellate court decisions. Moreover, the division in this case among the judges of the District of Columbia Circuit, splitting 5-4 in denying rehearing is indicative of the need for authoritative guidance by this Court.

The court below rejected the Board's rationale that where, as here, the economic realities established that "the picketing was reasonably calculated" to induce consumers to withhold all patronage, such picketing was proscribed by the Act (D. P. 36a). In so doing, the court of appeals declined to follow the decisions not only of every other court of appeals to pass on the question,[8] but also the controlling principle formulated by

8. *Hoffman* v. *Cement Masons Union Local 337*, 468 F. 2d 1187 (9th Cir. 1972), *cert. den.*, 411 U. S. 986; *American Bread Company* v. *NLRB*, 411 F. 2d 147 (6th Cir. 1969); *NLRB* v. *Twin City Carpenters Dist. Council (Red Wing Wood Products, Inc.)*, 422 F. 2d 309 (8th Cir. 1970); *Salem Building Trades Council (Cascade Employers Ass'n)*, 163 NLRB 33, *enforced per curiam* 388 F. 2d 987 (9th Cir. 1968), *cert. den.* 391 U. S. 965 (1968).

another panel of the same circuit. Thus, that court in *Honolulu Typographical Union* v. *NLRB*, 401 F. 2d 952, 956 (1968), held that the legality of picketing to induce a product boycott depended upon the actual economic effect upon the secondary, stating:

> "The short answer, however is that the law makes distinctions in terms of the traditional and *economic realities* of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available to union in different labor circumstances.
>
> Here, *where picketing means a total boycott*, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutrals from this sort of disruption as the interest more deserving of protection. Indeed, the Supreme Court so stated in *Tree Fruits* when it characterized as one of the 'isolated evils' barred by § 8(b)(4)(ii)(B), *'picketing which persuades the customers of a secondary employer to stop all trading with him'.*" *Supra*, 277 U. S. at 71 (Emphasis supplied.)

Accord: *American Bread Co.* v. *NLRB*, 411 F. 2d 147, 154 (6th Cir. 1969), holding that in applying the *Tree Fruits* doctrine, the proper focus of attention is not on the "supposed form, but the reality of the picketing"; *NLRB* v. *Twin City Carpenters Dist. Council*, 422 F. 2d 309, 314 (8th Cir. 1970), holding that the legality of consumer picketing "depends upon the probable effect of the union appeal on the consumer".

Although the court of appeals below would distinguish *Honolulu Typographical* and *American Bread* on the grounds that the picketing in each of those cases sought to follow a product that had been integrated into a larger whole, that is a distinction without legal consequence. Whether the ultimate product is integrated or whether, as here, the product is the key inducement to customers, the controlling legal principle dictates the same result.

In either case, the foreseeable consequences of picketing is to induce a total boycott of the neutral's business. In any event, other conflicting decisions by sister circuits are not so distinguishable. Both *Hoffman* v. *Cement Masons Union, Local 337* and *Salem Building Trades Council, supra,* footnote 8, held unlawful picketing that boycotted the sole product marketed or used by a neutral on the grounds that such constitutes an appeal to customers to sever all patronage. In none of the foregoing decisions can the rationale be reconciled with the decision of the court below.

The disagreement among the courts of appeals on this issue is of serious moment to a large sector of the labor-management community. It leaves the law unsettled with respect to a wide variety of circumstances in which labor disputes may arise. Thus, many types of product lines such as automobiles, automobile parts, tires, mufflers, dairy products and countless others are marketed through retail outlets which sell that one line of products or which principally sell such product line. There is an urgent need for the Court to grant certiorari in this case so as to lay to rest a question having such wide-spread consequences.

B. The Scope and Underlying Premise of Tree Fruits Bears Re-examination.

Beyond the need to resolve the conflict within the federal judiciary, this case exemplifies the need to re-examine one of the fundamental tenets of the *Tree Fruits* doctrine. One of the underlying premises of that decision is that picketing that merely follows a struck product would not have the "coercive" effect contemplated by the statute upon the neutral retailer. The Court reasoned that a successful product boycott of this kind would only diminish the secondary employer's sales of the struck product, without significantly dislocating his business operations and therefore without creating "a separate dispute with the secondary employer" (*Tree Fruits supra.*, 377 U. S. at 72).

Explaining further, the Court said:

> "For example: If a public appeal [by a union] directed only at a product results in a decline of 25% in the secondary employer's sales of that product, the corresponding reduction of his purchases of the product is due to his inability to sell any more. But if the appeal is broadened to ask that the public cease all patronage, and if there is a 25% response, the secondary employer faces this decision: whether to discontinue handling the primary product entirely, even though he might otherwise have continued to sell it at the 75% level, in order to prevent the loss of sales of other products." *Ibid.*, 377 U. S. at 72, footnote 20.

In other words, the Court assumed that picketing directed at a single product would not place stress on the neutral's entire business operations.

However, it appears that the Court failed to take into account the myriad circumstances in which such a product boycott would dislocate the neutral retailer's entire operation. One such circumstance, already alluded to, is that in which the retail merchant specializes in a single product or line of products, even though as here, he may sell other items incidental to the main product line. Another such circumstance is where, although a merchant sells different products, he is so dependent upon the picketed product that a consumer boycott of that product will disrupt fundamental aspects of his business operation. Alexander's which depends on Bay gasoline for 50% of its total sales, suggests such a situation. Another example would be a department store which has traditionally advertised a well-known brand of men's or women's suits. Such a retailer may well find that it is not feasible to merely abandon the struck product for the course of the labor dispute, because it has already made a substantial commitment in inventory, in advertising and in customer relations to the use of the product. Product picketing in those instances strikes at the heart of the neutral's operation and in effect creates a separate dispute between

the union and the neutral party whom the statute was designed to protect.

These considerations did not enter into the Court's analysis apparently because it was focusing on an entirely different situation presented by the boycott of Washington apples which constituted only an insignificant portion of Safeway's retail business. However, the Court's failure to appreciate the potentially serious disruption of the neutral's business is of critical importance. Thus, the Court based its holding upon its perception that the legislative history did not clearly specify that the boycott of a single product was coercive conduct of the kind proscribed by the statute.

Nevertheless, subsequent decisions of this Court have construed the congressional intent to broadly encompass the protection of a neutral's business from injury due to labor disputes not his own. Thus, in *National Woodwork Manufacturers Assn.* v *NLRB*, 386 U. S. 612, 624 (1967), the Court quoted, 624 (1967), approvingly Senator Taft's explanation of the 1947 amendments that Section 8(b)(4)(B) was designed to prohibit "a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."[9]

Moreover, as the Court stated in *NLRB* v. *Local 825 International Union of Operating Engineers*, [*Burns and Roe*], 400 U. S. 297, 305 (1971): where "the foreseeable consequences of its secondary pressure [are more than] slight" and "the clear implication" of the union's conduct was "to bring . . . the [neutral] employers to their knees" in order "to force a change in [the primary's] policy", the conduct comes within the statutory ban. Where, in the case of a product boycott, there results an extensive dislocation of the neutral's business, such injury would seem to fall within the proscribed zone intended by Congress.

9. 93 Cong. Rec. 4198, II Legis. Hist. of the Labor-Management Relations Act of 1947, 1106.

Further cogency is added to these reasons for re-examination, by the criticism of Court's interpretation of the legislative intent on the grounds that it is attenuated. Even though the literal language of the statute encompassed all consumer-product picketing and even though the Court acknowledged no showing in the legislative history of an intent to exempt such conduct, the Court presumed that Congress intended such an exemption *absent* any unequivocal statement of an intent to prohibit that conduct. With respect to this analysis of the legislative history by the Court, one commentator has concluded, "The reasoning of the opinion in *Tree Fruits* appears to be inadequate to support the result reached." "Consumer Picketing the Court—the Questionable Yield of Tree Fruits," T. P. Lewis, 49 Minn. L. Rev. 479, 504 (Jan., 1965). Accord, dissent of Mr. Justice Harlan, *Tree Fruits, supra*, 377 U. S. at p. 80. The decision has also been criticized on the grounds its rationale, discussed above, affords no clear guidance as to its scope and applicability in other cases.[10]

Although the Court indicated that unspecified constitutional doubts may have influenced it to read the legislative history as narrowly as it did, there would seem to be no basis for doubts of the legislature's authority to regulate such picketing. See *IBT, Local 695* v. *Voght, Inc.*, 354 U. S. 284 (1957); (1976): "Secondary Consumer Picketing." *supra*, 44 Tulane L. Rev. at 540, f. n. 13. Also as Justice Harlan stated in his dissent (*Tree Fruits, supra*, 377 U. S. at p. 93), because the proviso to Section 8(b)(4)(B) permits alternative forms of communica-

10. "Secondary Consumer Picketing: Some Graphs on *Tree Fruits*," 44 Tulane L. Rev. 537 (April 1970), wherein the author analyzed the myriad circumstances in which neutrals would be substantially injured by product picketing, and concluded:

> "An ultimate clarification through judicial or legislative action is inevitable. It is difficult to see how any attempt at judicial clarification, without the overruling of *Tree Fruits*, can avoid further confusion."

Ibid. at 556.

tion, other than picketing, to advise the public of the Union's dispute with the producer of a struck product, no First Amendment problem is involved. In subsequent decisions, this Court has indicated approval of this view. Compare, *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968) with *Scott Hudgens* v. *N. L. R. B.*, ... U. S. ....., 91 LRRM 2489 (1976), overruling *Logan Valley*.

Because of the problems that have emerged since the *Tree Fruits* decision, both with respect to its underlying premises and the lack of guidance with respect to its scope, reconsideration at this time is warranted.

CONCLUSION.

For all of the foregoing reasons it is respectfully requested that a writ issue.

Respectfully submitted,

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